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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

11	CELLULAR ACCESSORIES FOR	)	Case No. CV 12-06736 DDP (SHx)
12	LESS, INC., a California	)	
12	corporation,	)	
13	Plaintiff,	)	<b>ORDER DENYING IN PART AND</b>
14	v.	)	<b>GRANTING IN PART DEFENDANTS'</b>
15	TRINITAS LLC, a Texas	)	<b>MOTION FOR SUMMARY JUDGMENT</b>
16	limited liability company;	)	
16	DAVID OAKS, an individual,	)	[Dkt. No. 90, 96]
17	Defendants.	)	
18	_____	)	

Presently before the court is Defendants Trinitas LLC and David Oakes's Motion for Summary Judgment. Having considered the submissions of the parties, the court denies the motion in part and grants it in part and adopts the following order.

**I. Background**

Plaintiff Cellular Accessories for Less, Inc. ("CAFL") and Defendant Trinitas LLC ("Trinitas") both sell mobile phone accessories on the internet. Defendant David Oakes is Plaintiff's former employee and the founder of Trinitas. (Complaint ¶¶ 12&16, Dkt. No. 1.)

1 Plaintiff owns and operates a website that contains extensive  
2 descriptions for approximately 10,000 products. (Id. ¶ 9; Dec. of  
3 R. Morrison ¶ 2.) Plaintiff provides product descriptions that go  
4 beyond the product specifications provided by manufacturers. (Dec.  
5 of R. Morrison ¶ 3.) Plaintiff alleges these extended product  
6 descriptions give it a competitive advantage because they provide  
7 accurate, detailed content and therefore allow its customers to  
8 make informed purchasing decisions. (Id.)

9 To produce these product descriptions, Plaintiff employs  
10 individuals to add extra text to the basic product specifications  
11 and facts provided by the manufacturers. (Dec. of R. Morrison ¶  
12 7.) Specifically, Plaintiff alleges that website manager Ryan  
13 Morrison authored the text under the "Bluetooth Headset Benefits"  
14 heading found on the product description page for the M155 Marque  
15 Voice Controlled Bluetooth Wireless Headset ("M155"). (Dec. of R.  
16 Morrison ¶ 10.) The same text under the Bluetooth Headset Benefits  
17 heading was duplicated on Defendants' website. (Id. ¶ 20.) The  
18 same text was also found on another cellular accessory company's  
19 website. (Dec. of M. Cogburn Ex. A at p.114:5-25, 115:1-12.)

20 Plaintiff identifies 971 product descriptions it alleges  
21 Defendants copied. (Complaint Ex. B, Dkt. No. 1.) In addition to  
22 these product descriptions, Plaintiff asserts that Defendants also  
23 duplicated the Frequently Asked Questions ("FAQ") section. (Dec.  
24 of R. Morrison ¶ 21.)

25 On May 18, 2012 and July 17, 2012, Plaintiff's counsel sent  
26 Digital Millennium Copyright Act ("DMCA") notification  
27 correspondences to the web host for Defendants' website listing 49  
28 product descriptions that Plaintiff identified as its copyrighted

works. (Dec. of M. Cogburn Ex. A, Exs. 4-5 of Langstein Deposition.) These notices demanded that the web host for Defendants' website immediately take down the web content that infringed upon Plaintiff's copyright. (Id.) Plaintiff's President, Mitchell Langstein, reviewed and authorized these DMCA notices. (Dec. of M. Cogburn Ex. A at p. 104:20-22, 106:11-23.)

After Defendants received these DMCA notices, they began to change the product descriptions mentioned in the notices to keep its website alive. (Dec. of M. Cogburn ¶ 4.) At that time, Defendants also removed and changed the FAQ and Corporate Account section. (Id.) On August 6, 2012, Plaintiff was issued Copyright Registration No. TX 7549240, which covers the CAFL website and its content, including the product descriptions. (Dec. of M. Cogburn ¶ 3, Ex. B; Dec. of R. McWilliams ¶ 2, Ex. A.) That same day, Plaintiff filed this action seeking injunctive relief against Defendants for copyright infringement. (Complaint ¶ 1, Dkt. No. 1.) Plaintiff also raised other causes of action that are not at issue here. (Id.)

In this motion for summary judgment, Defendants seek summary judgment on the copyright infringement claim, arguing that Plaintiff does not own a valid copyright and that Plaintiff does not possess any protectable interest in what has allegedly been infringed.

## **II. Legal Standard**

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no genuine dispute as to any material fact and the movant is entitled

1 to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party  
2 seeking summary judgment bears the initial burden of informing the  
3 court of the basis for its motion and of identifying those portions  
4 of the pleadings and discovery responses that demonstrate the  
5 absence of a genuine issue of material fact. See Celotex Corp. v.  
6 Catrett, 477 U.S. 317, 323 (1986). If the moving party meets its  
7 burden, the burden shifts to the nonmoving party opposing the  
8 motion, who must "set forth specific facts showing that there is a  
9 genuine issue for trial." Anderson, 477 U.S. at 256.

10 "Although summary judgment is not highly favored on questions  
11 of substantial similarity in copyright cases, summary judgment is  
12 appropriate if the court can conclude, after viewing the evidence  
13 and drawing inferences in a manner most favorable to the non-moving  
14 party, that no reasonable juror could find substantial similarity  
15 of ideas and expression." Narell v. Freeman, 872 F.2d 907, 909-10  
16 (9th Cir. 1989). "Where reasonable minds could differ on the issue  
17 of substantial similarity, however, summary judgment is improper."  
18 Shaw v. Lindheim, 919 F.2d 1353, 1355 (9th Cir. 1990).

### 19 **III. Discussion**

20 "To establish [copyright] infringement, two elements must be  
21 proven: (1) ownership of a valid copyright, and (2) copying of  
22 constituent elements of the work that are original." Feist  
23 Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361  
24 (1991).

#### 25 **A. Ownership of a valid copyright**

26 "[A] certificate of copyright registration constitutes prima  
27 facie evidence of copyrightability and shifts the burden to the  
28 defendant to demonstrate why the copyright is not valid." Bibbero

1 Sys., Inc. v. Colwell Sys., Inc., 893 F.2d 1104, 1106 (9th Cir.  
2 1990). Defendant may rebut the presumption of copyrightability by  
3 showing that the plaintiff's work is not original. N. Coast Indus.  
4 v. Jason Maxwell, Inc., 972 F.2d 1031, 1033 (9th Cir. 1992). To be  
5 original, "[a]ll that is needed to satisfy both the Constitution  
6 and the statute is that the 'author' contributed something more  
7 than a 'merely trivial variation, recognizably 'his own.'" Sid &  
8 Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1163  
9 n.5 (9th Cir. 1977), *superseded on other grounds by* 17 U.S.C. §  
10 504(b) (quoting Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99,  
11 102-03 (2d Cir. 1951). "[T]he requisite level of creativity is  
12 extremely low; even a slight amount will suffice." Feist, 499 U.S.  
13 at 345.

14 Plaintiff holds a certificate of copyright registration for  
15 the contents of the CAFL website, including the product  
16 descriptions and the FAQ section. (Dec. of M. Cogburn ¶ 3, Ex. B;  
17 Dec. of R. McWilliams ¶ 2, Ex. A.) Thus, Plaintiff has provided  
18 prima facie evidence of owning a valid copyright. However,  
19 Defendants dispute the validity of Plaintiff's copyright.  
20 Specifically, Defendants argue that Plaintiff did not author the  
21 product descriptions on the CAFL website, but that these  
22 descriptions came from the manufacturer. To the degree that  
23 Plaintiff edited, rearranged or modified the product descriptions,  
24 Defendants argue that the edits are not sufficiently original to  
25 warrant copyright protection. (Mot. Summ. J. at 7:14-18.)

26 Such general allegations are not sufficient to shift the  
27 burden to Plaintiff to prove that its work is original. Defendant  
28 argues that "Plaintiff must present and outline the exact elements

1 of similarity after deleting all 'unprotectable elements . . . .'"  
2 (Reply at 2:16-17.) This is an incorrect statement of the burden.  
3 As the Ninth Circuit has explained,

4 [A] defendant may challenge the originality of a plaintiff's  
5 [work] by showing that it is in fact a copy of a preexisting  
6 one . . . . [I]n order to establish that the plaintiff copied  
7 a preexisting work, a *defendant must show . . . that*  
8 *plaintiff's work is substantially similar to the prior work in*  
9 *both ideas and expression.*

10 N. Coast Indus. v. Jason Maxwell, Inc., 972 F.2d 1031, 1033-34 (9th  
11 Cir. 1992) (emphasis added). Thus the burden is clearly on  
12 Defendants, both as the summary judgment movants and as the parties  
13 relying on the non-originality defense, to show that Plaintiff's  
14 work is non-original by comparing it to preexisting works-e.g., the  
15 manufacturer's descriptions. If Defendants could show conclusively  
16 that Plaintiff had copied large portions of the allegedly  
17 copyrighted material, and that what remained afterward was trivial,  
18 it could succeed on its summary judgment. See, e.g., Excelligence  
19 Learning Corp. v. Oriental Trading Co., C 03-4947 JF, 2004 WL  
20 2944048 (N.D. Cal. Dec. 20, 2004) ("The Court concludes that when  
21 the unprotectable elements are filtered out, and only the  
22 protectable elements are considered, no reasonable trier of fact  
23 could find that the catalogs are substantially similar.").

24 Plaintiff identifies, in a side-by-side comparison, 971  
25 product descriptions it alleges Defendants copied. (Complaint Ex.  
26 B, Dkt. No. 1.) However neither party has done the work, described  
27 by Defendants as "onerous and burdensome," (Reply at 2:15), of  
28 separating out the protectable elements from the allegedly non-

1 protectable ones in all 971 product descriptions. As discussed  
2 above, the burden to do so falls to the Defendants.

3 Defendants have presented some evidence to show that the  
4 product description of the M155 Bluetooth Headset contains some  
5 non-original elements. In a deposition, Mitchell Langstein  
6 admitted that the product description starting with the words  
7 "sleek and lightweight" and ending with "the smart way to connect  
8 with your smartphone" as well as the product description under  
9 "Product Features" starting with "[t]he easiest way to answer  
10 handsfree," and down to "excellent sound quality and amazing  
11 lightweight design" appeared to be an exact copy of those found on  
12 the manufacturer's website. (Dec. of M. Cogburn Ex. A at p.112:13-  
13 25, 113:1-5.) Plaintiff does not appear to dispute that these  
14 sections are not original.

15 Apart from that portion of the M155 product description,  
16 however, Defendants have not demonstrated that the product  
17 descriptions—all of which are the subject of registered copyright,  
18 and so presumptively protectable—are non-original and therefore  
19 non-protectable. Thus, Defendants have not "identified those  
20 portions of the pleadings . . . which it believes demonstrate the  
21 absence of a genuine issue of material fact." Celotex, 477 U.S. at  
22 323.

23 Plaintiff also argues that the formatting and arrangement of  
24 facts under the headings "Specifications," "Included Parts,"  
25 "Accessories/Replacement Parts" and "Product Documentation" are  
26 entitled to copyright protection. Ryan Morrison states that  
27 "[t]his arrangement of facts within these sections was not done  
28 alphabetically or based on any other party" and that "the

1 arrangement and selection of facts to include in these sections was  
2 based on the standard format that I personally developed for  
3 Cellular." (Dec. of R. Morrison ¶ 17.) Defendants do not appear  
4 to dispute Plaintiff's claim that one of its employees  
5 independently chose to select and format the facts under those  
6 headings. Thus, to the extent that Plaintiff's employee selected  
7 and arranged the facts under the heading, Defendants have not shown  
8 Plaintiff did not exercise the minimal degree of creativity that is  
9 required for copyright protection. See Feist Publications, Inc. v.  
10 Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) ("Factual  
11 compilations . . . may possess the requisite originality. The  
12 compilation author typically chooses which facts to include, in  
13 what order to place them, and how to arrange the collected data. .  
14 . . . These choices . . . are sufficiently original.")

15 Finally, Plaintiff argues that the FAQ section of its website  
16 is entitled to copyright protection. The FAQ consists of questions  
17 about Plaintiff's products and brief answers. Defendants do not  
18 dispute Plaintiff's claim that the FAQ section is original and  
19 protectable.

20 In short, there are genuine issues of fact as to the  
21 originality of the product description texts, the arrangement of  
22 the facts under certain headings on the product description pages,  
23 and the FAQ section. Thus, Defendants are not entitled to summary  
24 judgment based on a non-originality argument.

25 **B. Copying of the constituent elements of the work that are**  
26 **original.**

1 In addition showing that it holds a valid copyright in at  
2 least some portions of the work, Plaintiff must also show that  
3 Defendants copied from the protectable elements.<sup>1</sup>

4 The Ninth Circuit applies a two part test, an extrinsic test  
5 and an intrinsic test, to determine whether there is copying  
6 sufficient to constitute infringement. Apple Computer, Inc. v.  
7 Microsoft Corp., 35 F.3d 1435, 1442 (9th Cir. 1994). "At summary  
8 judgment, courts apply only the extrinsic test, [which examines  
9 similarities between the two works based on external criteria]; the  
10 intrinsic test, which examines an ordinary person's subjective  
11 impressions of the similarities between two works, is exclusively  
12 the province of the jury." Funky Films, Inc. v. Time Warner Entm't  
13 Co., L.P., 462 F.3d 1072, 1077 (9th Cir. 2006). "A plaintiff  
14 avoids summary judgment by satisfying the extrinsic test which  
15 makes similarity of the works a triable issue of fact." Kouf v.  
16 Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir.  
17 1994). A triable issue of fact "exists when the plaintiff provides  
18 indicia of a sufficient disagreement concerning the substantial  
19 similarity of two works to require submission to a jury." Brown  
20 Bag Software v. Symantec Corp., 960 F.2d 1465, 1472 (9th Cir.  
21 1992)(internal quotation marks and citation omitted).

22 However, a substantial similarity analysis is not required  
23 when defendants "admit that they in fact copied," Norse v. Henry  
24 Holt & Co., 991 F.2d 563, 566 (9th Cir. 1993), or when a "defendant  
25

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26 <sup>1</sup>Plaintiff does not need to show that defendant copied  
27 Plaintiff's work in its entirety. L.A. Printex Indus., Inc. v.  
28 Aeropostale, Inc., 676 F.3d 841, 852 (9th Cir. 2012). It is enough  
that the defendant appropriated a substantial portion of the  
plaintiff's work. Id.

1 has engaged in virtual duplication of a plaintiff's entire work,"  
2 Narell v. Freeman, 872 F.2d 907, 910 (9th Cir. 1989). See also  
3 Range Rd. Music, Inc. v. E. Coast Foods, Inc., 668 F.3d 1148, 1154  
4 (9th Cir. 2012) (holding that substantial similarity is not an  
5 element of a copyright infringement claim).

6 Defendants do not dispute Plaintiff's claim that their website  
7 is substantially similar to Plaintiff's website. Instead,  
8 Defendants again argue that Plaintiff's website consists of  
9 unprotectable elements. However, originality goes to the *first*  
10 prong of the Feist test,<sup>2</sup> already discussed. The second prong goes  
11 to evidence of copying of whatever original material there is. The  
12 issue is whether "the *protectible elements, standing alone*, are  
13 substantially similar." Cavalier v. Random House, Inc., 297 F.3d  
14 815, 822 (9th Cir. 2002)(internal quotation marks and citation  
15 omitted)(emphasis in original).

16 Defendants also do not appear to dispute the deposition  
17 testimony of Defendants' website designer, Aelora Qahlwyn.  
18 Qahlwyn admitted that Defendant Oakes instructed her to copy and  
19 paste product descriptions and images from Plaintiff's website.  
20 (Dec. of R. McWilliams, Ex. B at 36:5-25, 37:1-2.) Because, as  
21 noted above, Defendants have not shown that the product  
22 descriptions do not contain nontrivial amounts of original  
23 material, this amounts to an admission of direct copying of  
24 presumptively protectable copyrighted material. Because Plaintiff  
25 has provided direct evidence of copying, the Court does not need to  
26 engage in a substantial similarity analysis. Rd. Music, Inc. v. E.

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27  
28 <sup>2</sup>See initial text of Part III., supra.

1 Coast Foods, Inc., 668 F.3d 1148, 1154 (9th Cir. 2012).<sup>3</sup> There is  
2 a genuine issue of fact as to infringement of the product  
3 descriptions and their arrangements and Defendants are not entitled  
4 to summary judgment.

5 Finally, Defendants' FAQ section appears to be substantially  
6 similar to Plaintiff's FAQ section. Plaintiff argues that  
7 Defendants copied Cellular's 2012 FAQ section either verbatim or  
8 nearly verbatim. To support this claim, Plaintiff relies on  
9 Qahlwyn's testimony and Langstein's declaration. First, Qahlwyn  
10 testified that she created the FAQ page and inputted information  
11 that was provided by Defendant Oakes or Katie Oakes. (Dec. of R.  
12 McWilliams, Ex. B at p. 44:18-25, 45: 1-25.) Although this  
13 information suggests that Defendant Oakes may have taken the  
14 information from Plaintiff's website because he was previously  
15 employed by Plaintiff, it is unclear where the information was  
16 taken from exactly. Second, in Langstein's declaration, he stated  
17 that "the copy and paste job was so extensive that many of the  
18 images and hyperlinks in the FAQ contained links, whether active or  
19 broken, to the Cellular website." (Dec. of Langstein ¶ 5.) This  
20 is at least circumstantial evidence of copying.  
21  
22

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23 <sup>3</sup>The Court notes, however, that text under the "Bluetooth  
24 Headset Benefits" heading found on Plaintiff's M155 product  
25 description page is found verbatim on Defendants' website. (Dec.  
26 of R. Morrison, ¶ 18 & Exs. B & D.) Defendants' website also has  
27 the same arrangement of facts under certain headings on the M155  
28 product page as those found on Plaintiff's website. (Dec. of R.  
Morrison, Exs. B & D.) Specifically, the facts under the "Product  
Features" heading and "Included Parts" heading are identical on  
both websites. Thus, there is at least some evidence of  
substantial similarity of original content, at least with regard to  
the M155 product page and description.

1           However, even if there were no evidence of copying, the FAQ  
2 section on the two websites appear to be substantially similar to  
3 one another. Defendants' FAQ section contains seven of the nine  
4 headings found on Plaintiff's FAQ section and contains a similar  
5 number of questions under each heading. (Dec. of R. Morrison Exs.  
6 E & F.) A side by side comparison illustrates that these headings  
7 and questions are similarly ordered. (Id.) Moreover, the  
8 questions are similarly framed. (Id.) For example, under the  
9 "Cases" heading, Plaintiff frames a question as "I received a pouch  
10 case that is made by a different manufacturer than my phone. For  
11 example, a Blackberry case for my iPhone. Is this a mistake?"  
12 whereas Defendants frame the question as "I received a pouch case  
13 by a different manufacturer than my phone. Is this a shipping  
14 error?" (Id.) Also, under the "Batteries" heading, Plaintiff  
15 frames a question as "How long do batteries last before they need  
16 to be replaced? Can I do anything to prolong their lifespan?"  
17 whereas Defendants frame the question as "How long before I will  
18 need a replacement battery? Anything I can do to prolong the  
19 lifespan?" (Id.) Because a side by side comparison reveals that  
20 the wording and number of questions are not different from each  
21 other, there is a issue of fact as to the substantial similarity  
22 between the two parties' FAQ section. Cf. Mist-On Sys., Inc. v.  
23 Gilley's European Tan Spa, 303 F. Supp. 2d 974, 978 (W.D. Wis.  
24 2002)("A side-by-side comparison of the parties' undoctored  
25 Frequently Asked Questions pages clearly reveals that the sequence,  
26 the wording and the number of the questions are different from each  
27 other.") Thus, Defendants are not entitled to summary judgment  
28

1 because a reasonable jury could find Defendants' FAQ section to be  
2 substantially similar to that of Plaintiff's.

3 **C. Unclean Hands Defense**

4 "The defense of unclean hands by virtue of copyright misuse  
5 prevents the copyright owner from asserting infringement and asking  
6 for damages when the infringement occurred by his dereliction of  
7 duty." Supermarket of Homes, Inc. v. San Fernando Valley Bd. of  
8 Realtors, 786 F.2d 1400, 1408 (9th Cir. 1986). "Plaintiff's action  
9 will be dismissed under the theory of unclean hands if defendant  
10 establishes that plaintiff's evidence was false and that plaintiff  
11 was involved in a scheme to defraud the public." Id. The unclean  
12 hands defense also "forbids the use of the [copyright] to secure an  
13 exclusive right or limited monopoly not granted by the [Copyright]  
14 Office and which is contrary to public policy to grant." Altera  
15 Corp. v. Clear Logic, Inc., 424 F.3d 1079, 1090 (9th Cir.  
16 2005)(internal quotation marks and citation omitted); see also A &  
17 M Records v. Napster, Inc., 239 F.3d 1004, 1026-27 (9th Cir.2001)  
18 (stating that copyright misuse "prevents copyright holders from  
19 leveraging their limited monopoly to allow them control of areas  
20 outside the monopoly.").

21 Defendants argue that they are entitled to summary judgement  
22 on their affirmative defense of unclean hands because Plaintiff has  
23 tried to gain a monopoly over marketing materials that it does not  
24 own, but are actually created by the manufacturers. However,  
25 Plaintiff disputes this and argues that it has never sought to  
26 prevent use of the marketing materials provided by the  
27 manufacturer. Instead, Plaintiff argues that it is only trying to  
28 protect its copyrighted works. (Dec. of Langstein ¶ 10.)

1 Plaintiff relies on Langstein's declaration. In his declaration,  
2 Langstein states that "Cellular does not seek to control areas  
3 outside of its copyright. . . ." (Dec. of Langstein ¶ 9.) Because  
4 Plaintiff has provided evidence that Plaintiff is not trying to  
5 control areas outside of the monopoly, and because in any event the  
6 exact scope of the copyright, if any, is the key issue in the case,  
7 there is an issue of fact as to copyright misuse. Thus, Defendants  
8 are not entitled to summary judgment.

9 **D. Remedies**

10 Defendants argue that they are entitled to summary judgment  
11 because Plaintiff has not established any actual damages suffered  
12 as a result of the alleged copying. (Mot. Summ. J. at 12:2-5.)  
13 Defendants also argue that Plaintiff's claim for damages should be  
14 stricken because the copyrighted work was neither registered prior  
15 to the commencement of the infringement nor within three months  
16 after first publication of the work, as required under 17 U.S.C. §  
17 412.

18 Plaintiff's complaint specifically requests both actual and  
19 statutory damages in its Prayer for Relief. (Compl., Prayer for  
20 Relief ¶¶ 4-7.) However, Plaintiff does not dispute that it is  
21 barred by § 412 from claiming statutory damages, and at oral  
22 argument Plaintiff's counsel stated that Plaintiff would no longer  
23 seek damages for this claim.

24 The Complaint also requests an injunction against any future  
25 use by Defendants of Plaintiff's allegedly copyrighted works, and  
26 an order to take down the allegedly infringing website. (Compl. ¶¶  
27 37-39.) Plaintiff may proceed with its copyright claim for  
28 injunctive relief only.

1 **IV. Conclusion**

2 For the reasons stated above, Defendant's Motion for Summary  
3 Judgment is DENIED IN PART AND GRANTED IN PART. The Court grants  
4 summary judgment to Defendants as to any claim for damages arising  
5 out of the alleged copyright infringement. However, summary  
6 judgment is denied as to a claim for injunctive relief.

7 Additionally, Plaintiff has filed an ex parte application to  
8 be allowed to file a surreply in order to address a question about  
9 when Defendants had notice of Mr. Morrison's role in creating  
10 website content. (Dkt. No. 96.) However, because that issue does  
11 not touch on the remedies question, and because Plaintiff survives  
12 the Motion as to the substantive issues, the application is DENIED  
13 as moot.

14  
15 IT IS SO ORDERED.

16  
17  
18 Dated: November 5, 2014

  
DEAN D. PREGERSON  
United States District Judge